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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

IVAN RENE MOORE,

Plaintiff and Appellant,

v.

PHYLLIS LERNER,

Defendant and Respondent.

B275354

Los Angeles County  
Super. Ct. No. BC531807

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Michael J. Raphael, Judge. Affirmed.

Susan E. Hargrove for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez,  
Kenneth C. Feldman and Patrik Johansson for Defendant  
and Respondent Phyllis Lerner.

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Appellant Ivan Rene Moore appeals from the dismissal of his action against respondent Phyllis Lerner after he failed to post a vexatious litigant bond under Code of Civil Procedure section 391.<sup>1</sup> Moore argues the trial court erred in failing (1) independently to evaluate whether he was a vexatious litigant and (2) to “offset” against the bond a \$2 million judgment against a different defendant in a related case. We affirm.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### **1. *The underlying action, Case No. BC297994 (the 994 Action)***

Moore was the owner of Mo’ Better Meaty Meat Burgers, located at the corner of Fairfax and Pico. Moore made improvements to the property costing in excess of \$100,000.

The property was owned by the Albert and Dorothy Brinhendler Trust (the Trust) dated March 22, 1999. Albert and Dorothy Brinhendler were the trustees of the Trust. Dorothy Brinhendler died in August 2003, and in July 2009 the Trust was amended to name Leonard Lerner as a successor trustee. After Albert Brinhendler died in December 2009, Leonard Lerner became the sole trustee of the Trust. By early 2010 Leonard Lerner had made all distributions called for by the terms of the Trust. Respondent Phyllis Lerner is not and never has been a trustee of the Trust.

In July 2002, the Trust agreed to give Moore a right of first refusal for the purchase of the property. However, according to Moore, the Trust and trustees sold the property to a third party in violation of that agreement.

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<sup>1</sup> Statutory references are to the Code of Civil Procedure unless otherwise noted.

Moore commenced the 994 Action in June 2003 for breach of contract and “intentional interference with prospective economic advantage.” After a number of years, the case went to trial in two phases in 2011 and 2013. In March 2013 a jury returned a verdict for Moore of \$2 million in damages against Leonard Lerner in his capacity as trustee of the Trust. Judgment was not entered on the verdict at Moore’s request; he took the position that his tort cause of action remained to be tried. The trial court eventually dismissed that remaining claim in March 2016.

**2. *Moore’s lawsuits arising from the 994 Action: Case Nos. BC531807 and BC355262 (the 807 and 262 Actions)***

On December 30, 2013, Moore filed the 807 case in propria persona, alleging a single claim under the Uniform Voidable Transactions Act (Civil Code section 3439 et seq.) (UVTA)<sup>2</sup> to set aside a fraudulent transfer against (among others) Leonard Lerner, individually and as trustee of the Trust, and Phyllis Lerner individually. Moore asserted that Leonard Lerner—one year before the trial in the 994 Action—improperly transferred assets from the Trust to family members.

At some point—possibly in 2006—Moore filed the 262 Action against Leonard Lerner as trustee and in his individual capacity, the Brinhendlers (Dorothy was deceased), Phyllis

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<sup>2</sup> Moore refers to this statute as the “Uniform Fraudulent Transfer Act.”

Lerner, and others, “to set aside transfer of fraudulent sale” and for specific performance, an accounting, and declaratory relief.<sup>3</sup>

**3. *Several judges determine Moore to be a vexatious litigant***

In October 2012, Los Angeles Superior Court Judge Michelle R. Rosenblatt declared Moore to be a vexatious litigant in Case No. BC464111 (the 111 Action) under section 391, subparagraph (b)(1). The case was related to Case Nos. BC475551, BC480013, and BC483652. Judge Rosenblatt found Moore had “filed or maintained at least five litigations within the preceding seven years in propria persona, that were determined adversely to him.” Based on Judge Rosenblatt’s order, Moore apparently was put on the Vexatious Litigant List maintained by California’s Administrative Office of the Courts, and the Los Angeles Superior Court entered a prefiling order under section 391.7 barring Moore from filing any new litigation without leave of the presiding judge.

In October 2014, Leonard Lerner filed a motion in the 807 Action to require Moore to furnish security under section 391.1. After a hearing, the court—Judge Mitchell L. Beckloff—issued an order on November 25, 2014 granting the motion. Judge Beckloff found there was no reasonable likelihood Moore would prevail on his claim against Leonard for violation of the UVTa. Leonard had presented evidence—which Moore had not refuted—that he never had been a beneficiary of the Trust nor had he received any money from it. Accordingly, Judge Beckloff concluded, Leonard “cannot be liable as a transferee of a fraudulent transfer.”

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<sup>3</sup> Only the 807 Action is the subject of this appeal. Both the 994 Action and the 262 Action were deemed related cases.

Judge Beckloff ordered Moore to post security in the amount of \$165,000. Moore refused and Judge Beckloff dismissed Leonard from the 807 case “in his capacity as successor trustee.”

In August 2015, Leonard Lerner, in his capacity as trustee, filed a motion in the 262 Action to require Moore to post security as a vexatious litigant. The court in that case—Judge John P. Farrell—found Moore to be a vexatious litigant and concluded there was “no reasonable probability based on the evidence presented that he will prevail.” Judge Farrell ordered Moore to post security in the amount of \$75,000. When Moore failed to do so, the court—Judge Michael J. Raphael now handling the case—entered a judgment of dismissal of Leonard in the 262 Action.

In August 2015, Leonard also filed a motion in the 994 Action for an ordering requiring Moore to post security as a vexatious litigant.<sup>4</sup> Judge Raphael granted the motion in a written ruling filed on October 1, 2015. Citing the prior orders by Judges Beckloff and Farrell, Judge Raphael stated, “[T]here is no reasonable dispute that plaintiff is a vexatious litigant.” Judge Raphael found Moore had no reasonable likelihood of prevailing on the merits of the case. Judge Raphael noted the jury had “found that the [T]rust honored plaintiff’s right of first refusal with respect to the sale of certain real property where plaintiff operated a business.” The court also found Moore had offered no evidence “of future economic benefit he was expecting to derive from his business,” nor any evidence showing that the Trust “knew of plaintiff’s plans to expand his business.”

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<sup>4</sup> Neither appendix contains a copy of this motion.

Judge Raphael ordered Moore to post security of \$35,000. Moore failed to do so and on December 18, 2015, the court granted Leonard's motion to dismiss the 994 Action as to him.

**4. *Phyllis Lerner's motion to require Moore to post security in the 807 Action***

On October 19, 2015, Phyllis Lerner filed a motion in this case under section 391.1 to require Moore as a vexatious litigant to furnish security. Phyllis cited Judge Rosenblatt's 2012 order in the 111 Action. She also asserted Moore had no reasonable probability of success on the merits because the transfer of the Trust's assets was made under the terms of the Trust. The Trust provided that, upon the death of the settlors Albert and Dorothy Brinhendler, the corpus would be distributed to the settlors' children, Nadine Krulevitch and Phyllis Lerner. Moreover, Phyllis Lerner was not and never had been a trustee of the Trust, and therefore could not have any liability for the transfer.

Moore's opposition asserted he had been declared a vexatious litigant in error; Phyllis Lerner's motion was an untimely and improper motion for reconsideration of a motion Leonard Lerner had made in October 2014; and Moore had a reasonable probability of success on the merits because Leonard Lerner admitted he disbursed funds from the Trust after the last settlor died. In reply, Phyllis Lerner pointed out the previous motion addressed *Leonard Lerner's* vexatious litigant motion.

The trial court (Judge Raphael) issued a tentative ruling and heard the motion on November 16, 2015. The court issued its ruling later that day. The court noted Judge Beckloff had found Moore to be a vexatious litigant in this case on November 25, 2014. The court also referenced Judge Farrell's August 2015 order in the 262 Action and Judge Rosenblatt's

order in the 111 Action. Based on those orders, Judge Raphael found Moore was a vexatious litigant. The court determined Moore had no reasonable likelihood of prevailing because he offered no evidence implicating Phyllis Lerner in the underlying events. The court listed the elements of a cause of action for fraudulent transfer under the UVTA: the first is that a judgment debtor made a transfer. Moore presented no evidence that Phyllis transferred anything.

The trial court rejected Moore's "improper reconsideration" argument under section 1008 because the previous orders requiring a bond concerned Leonard, not Phyllis. The court ordered Moore to post security of \$35,000 under section 391.3, subdivision (a). After Moore declined to post the bond, the court dismissed the action on February 22, 2016. On May 5, 2016, the trial court entered its judgment of dismissal as to Phyllis Lerner.

## **DISCUSSION**

### **1. *Moore is a vexatious litigant***

"The vexatious litigant statutes (§§ 391–391.7) are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants." (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169.) Section 391.1 provides that in any litigation pending in a California court, the defendant may move for an order requiring the plaintiff to furnish security on the ground the plaintiff is a vexatious litigant and has no reasonable probability of prevailing against the moving defendant. The action is stayed pending determination of the motion. (§ 391.6.) If, after a hearing, the court finds for the defendant on these points, it must order the plaintiff to furnish security "in such

amount and within such time as the court shall fix.” (§ 391.3, subd. (a).) The plaintiff’s failure to furnish that security is grounds for dismissal. (§ 391.4.)

A court exercises its discretion in determining whether a person is a vexatious litigant. We will uphold the trial court’s ruling if substantial evidence supports it; we presume the order is correct and will imply findings necessary to support the judgment. (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219.)

Here, Moore qualified as a vexatious litigant. Judge Beckloff already had found Moore to be a vexatious litigant in this case. Judge Farrell also had found Moore to be a vexatious litigant in the 262 Action, a case plainly “based upon the same or substantially similar facts, transaction, or occurrence” within the meaning of section 391, subdivision (b)(4). As of April 6, 2018, Moore remained on the Administrative Office of the Courts’ Vexatious Litigant List.<sup>5</sup>

On the second prong of the inquiry, Moore did not have a reasonable probability of prevailing on the merits. He has no claim against Phyllis Lerner. Because she is not a trustee, Phyllis had and has no power to make any distributions of trust assets. (See *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1131 [powers of trustee].) As a result, Phyllis cannot be liable for making a fraudulent conveyance as she lacked the ability

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<sup>5</sup> Moore apparently filed a motion to be removed from the list under section 391.8. Neither appendix includes a copy of this motion. On November 20, 2014, Judge Daniel Buckley denied the motion, stating, “Moore . . . continu[es] to file improper and vexatious documents.” On December 5, 2014, Moore filed a notice of appeal from Judge Buckley’s ruling. On January 22, 2015, Presiding Justice Boren found Moore had failed to show his appeal had merit and therefore dismissed the appeal.



to make a transfer. (See Civ. Code, § 3439.01, subd. (m); *Sturm v. Moyer* (2019) 32 Cal.App.5th 299, 308.)

**2. *Moore is not exempted from the bond requirement***

Moore seeks to use his unliquidated \$2 million judgment against the Trust to “offset” the bond the court required him to post on Phyllis Lerner’s behalf.

The first problem with this contention is that Moore’s judgment was against the Trust—technically, Leonard Lerner as successor trustee—not Phyllis. Plainly, one cannot offset a financial obligation against a person or entity who is not a judgment debtor.

In any event, Moore cites no authority that such an “offset”—even against the right person or entity—is legally permissible. Under the vexatious litigant statutes, an undertaking is required to permit the action to proceed. (§ 391.3.) Where a bond is statutorily required, the undertaking must be in a form sufficient under section 995.010 et seq. (the Bond and Undertaking Law), governing bonds and sureties. (§ 995.020, subd. (a).) Thus, Moore must post either a bond or an undertaking from an admitted surety insurer or personal surety (with sufficient qualifications), or a cash deposit in lieu thereof. (§§ 995.120 [admitted surety insurer], 995.510 [sufficiency of personal surety], 995.710, subd. (a) [deposit in lieu of bond].) The court has no power to waive these requirements by accepting an alternate form of security. (See, e.g., *Markley v. Superior Court* (1992) 5 Cal.App.4th 738, 752 [court could not accept trust deed as alternative security for \$2 million undertaking in lis pendens proceedings].)

Thus, the trial court properly denied Moore's request to use the \$2 million judgment against the Trust in the 994 Action to offset the bond requirement in the 807 Action.

**DISPOSITION**

The judgment is affirmed. Respondent Phyllis Lerner is to recover her costs on appeal.

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EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.